SUPREME COURT, U. S.

FILED
AUG 31 1961
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1961

No. 373

In the Matter of the Application of
TWENTIETH CENTURY-FOX FILM CORPORATION,

Appellant,

against

LAWRENCE E. GEROSA, as Comptroller of the City of New York,

Appellee,

for an order pursuant to Article 78 of the Civil Practice Act to review a determination of Lawrence E. Gerosa, as Comptroller of the City of New York.

JURISDICTIONAL STATEMENT

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SUBJECT INDEX

	PAGE
The Opinions Below	1
Grounds of this Court's Jurisdiction	2
Questions Presented	5
Statement of the Case	6
The Substantial Federal Questions	6
Raising the Constitutional Issue	8
The Facts as to the Tax	8
The Law as to the Tax	14
The Facts As to the Denial of Due Process	22
The Law As to the Denial of Due Process	24
Conclusion	27
Appendix A—The Opinions of the Courts Below	29
Opinion of Appellate Division on Intermediate Order	29
Opinion of Appellate Division on Final Order	30
Opinion of Court of Appeals on Final Order and on Motion to Include the Referees' Reports in the Record	30
Opinion of Court of Appeals on Motion to Amend Decision to Recite what had Occurred on Oral Argument before that Court	30
Appendix B—The Statutes Involved	31
Chapter 338, New York Laws of 1946	31

PAGE

New York City Local Law No. 14 of 1946 49

Chapter 489, New York Laws of 1948 69

New York City Local Law No. 44 of 1948 71

Appendix C—Orders Appealed From 78

Order of Remittiur 78

Final Order on Remittitur 82

Final Order On Remittitur 84

Order Denying Motion to Include Referees' Reports in the Record 86

Order on Motion to Amend Remittitur to Recite What Had Occurred On Oral Argument 88

TABLE OF CASES CITED

Application of O'Meally v. *Rohan*, 286 App. Div. 872, 142 N. Y. S. 2d 239 26

Dady v. *O'Rourke*, 172 N. Y. 447, 65 N. E. 273 19

Independent Warehouses v. *Scheele*, 331 U. S. 70 5

Jamison v. *Texas*, 318 U. S. 413 5

Joseph v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422 .....7, 17

King Manufacturing Co. v. *City Council of Augusta*, 277 U. S. 100 5

Mazza v. *Cavicchia*, 15 N. J. 498, 105 A. 2d 545 25

PAGE

Muzak Corp. v. *Taft Hotel Corp.*, 1 NY 2d 42, 133 N. E. 2d 688 ..... 19, 21

O'Keeffe v. *City of New York*, 173 N. Y. 474, 66 N. E. 194 19

Poulos v. *New Hampshire*, 345 U. S. 395 5

Richfield Oil Corporation v. *State Board of Equalization*, 329 U. S. 69 ..... 6, 15, 17

United Artists v. *Taylor*, 273 N. Y. 334, 7 N. E. 2d 254 20

Universal Oil Products Co. v. *Root Refining Co.*, 328 U. S. 575 ..... 8, 24

Youngstown Sheet & Tube Co. v. *Bowers*, 358 U. S. 534 15

TABLE OF TEXT BOOKS AND STATUTES CITED

Restatement of the Law of Contracts, Vol. 1, p. 319 .. 21

(No statutes are cited other than the taxing statutes involved in this proceeding, which are set forth in Appendix B hereof.)

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JURISDICTIONAL STATEMENT

The Opinions Below

There are not, in any real sense, any opinions delivered by the courts below except an Appellate Division interim opinion sending the case back to appellee for the redetermination of penalties. The propriety of penalties is not a question which appellant seeks to have reviewed here.

The opinions, if they can properly be called such, are nevertheless set forth in Appendix A, together with citations in instances where the opinions have been published.

Grounds of This Court's Jurisdiction

This proceeding was commenced in the Supreme Court of the State of New York, County of New York, as one under Article 78 of the New York Civil Practice Act to review the determination of an administrative officer,—in this case, the assessment and collection by the Comptroller of the City of New York of $31,411.28 alleged deficiency in General Business Tax (i.e., gross receipts tax) on certain of appellant's gross receipts in the calendar years 1946, 1947 and 1948 (R. 5-16). The General Business Tax is for the privilege of doing business in the City of New York in the twelve months period commencing on July 1 of the calendar year of the receipts taxed and ending on the following June 30 (*infra,* pp. 35, 52, 70-71, 72, 75).

Pursuant to Section 1296 of the New York Civil Practice Act the court of original jurisdiction, as a purely administrative act, transferred the proceeding to the Appellate Division of the Supreme Court for the First Judicial Department for determination on the petition and answer and on the stenographic record made before a referee in appellee's Bureau of Excise Taxes (R. 3-4). That court, in an intermediate opinion, confirmed the tax without opinion but vacated the penalties and sent that question back for redetermination by appellee (R. 672-676).

After redetermination, the case came up again in the same manner as before (R. 531-546) and the Appellate Division then entered its final order confirming the tax (R. 679-681).

Appellant then carried the case to the New York Court of Appeals (R. 669-670, 677-678) which affirmed without opinion (R. 684-687; *infra,* p. 30). That is the highest court of New York.

The court of original jurisdiction (the "lowest court") then entered two pro forma orders making the order of the Court of Appeals its order (R. 688-691). Both lowest court orders are substantially the same. The duplication arose from the fact that appellee had an order signed without notice and neither filed it nor served it. Fearing that its time to appeal might nevertheless be running, appellant got a similar order on notice to appellee and filed and served it.

Technically, the final orders are the two orders of the lowest court; but those are not orders of the highest court of the state [see requirements of U. S. Code, Title 28, section 1257(2)]. Therefore appellant has taken the precaution of appealing from all three,—the order of the Court of Appeals and the two orders of the Supreme Court, New York County, which were entered thereon (R. 710-711, 715-716). The details as to dates are as follows:

Court of Appeals Final Order of Remittitur—dated March 2, 1961 (*infra*, pp. 78-81)

Entered in Office of Clerk of County of New York on March 23, 1961

Re-entered in Office of Clerk of County of New York on April 3, 1961 after first recall and amendment of remittitur

Re-entered in Office of Clerk of County of New York on June 1, 1961 after second recall and amendment of remittitur

Supreme Court, New York County, Order on Remittitur—dated March 23, 1961 (*infra*, pp. 84-85)

Entered in Office of Clerk of County of New York on April 17, 1961

Supreme Court, New York County, Order on Remittitur—dated April 14, 1961 (*infra*, pp. 82-83)

Entered in Office of Clerk of County of New York on April 14, 1961

As will hereinafter be shown, the main question on the appeal from the foregoing orders is whether the taxing ordinance, as it has been applied here, violates the import-export clause of the federal constitution.

A second question is whether the Court of Appeals, and also the Appellate Division before it, deprived appellant of due process of law by receiving from appellee, and reading before they rendered their decisions, the written opinions and recommendations of appellee's referees in his Bureau of Excise Taxes, without requiring those opinions to be included in the record and without disclosing their contents to appellant or its counsel.

Those actions of the courts below could be evidenced only by motions of appellant reciting what had occurred and seeking relief (R. 693-701, 704-709). Neither appellee nor the Court of Appeals disputed appellant's recital of what had occurred; but the Court of Appeals refused relief in two orders dated respectively March 2, 1961 and March 23, 1961 (R. 692, 702-703; *infra*, pp. 86-89), both entered in the office of the Clerk of the County of New York on June 2, 1961. The appeal has been taken from those orders too (R. 711, 716-717).

The notice of appeal (R. 710-714) was filed in the Office of the Clerk of the County of New York on April 27, 1961. Because the Court of Appeals thereafter recalled and amended the remittitur a second time so as to state that the constitutional question had been presented and necessarily decided (R. 686), an amended notice of appeal (R. 715-720) was filed in the same office on June 2, 1961.

Jurisdiction of this appeal is conferred by section 1257(2) of Title 28, United States Code, inasmuch as (a) the appeal is from a final order of the highest court of New York, (b) the appeal draws in question the validity of Local Laws No. 14 of 1946 and No. 44 of 1948 of the City of New York on the ground that, as applied to this case by the court below, they are repugnant to clause 2 of section 10 of Article I (the import-export clause) of the Constitution of the United States (R. 686) and (c) the decision of the Court of Appeals is in favor of the validity of the local laws (R. 686). The foregoing local laws were enacted under enabling acts of the State of New York known as Chapter 338 of the Laws of 1946 and Chapter 489 of the Laws of 1948. The local laws and the enabling acts are set forth verbatim in Appendix B hereof.

The cases sustaining the jurisdiction of this Court are *King Manufacturing Co.* v. *City Council of Augusta,* 277 U. S. 100; *Jamison* v. *Texas,* 318 U. S. 413, 414; *Independent Warehouses* v. *Scheele,* 331 U. S. 70, 79; *Poulos* v. *New Hampshire,* 345 U. S. 395, 402. They are cases where this Court held that an ordinance of a municipality or other political subdivision of a state was within the purview of the words "statute of any state" as they are used in 28 U. S. C. § 1257(2).

Questions Presented

There are two questions:

1. The primary question is whether it was a violation of the import-export clause of the federal constitution for the City of New York to assess and collect a gross receipts tax on the rentals received by appellant for the use abroad of appellant's motion picture film which was shipped abroad from the City of New York.

2. The second question is whether the Court of Appeals deprived appellant of due process of law within the meaning of the Fourteenth Amendment to the Constitution by receiving from appellee's counsel over the protest of appellant's counsel and reading the reports of appellee's referees in his Bureau of Excise Taxes without disclosing their contents to appellant or its counsel and without requiring them to be inserted in the record.

STATEMENT OF THE CASE

The Substantial Federal Questions

The Court will be in a better position to evaluate the importance of this appeal if appellant, before setting forth the basic facts, explains why it deems the constitutional questions to be substantial.

By written agreement, appellant rented its motion picture film to a subsidiary for exploitation only outside the United States and Canada. The film was shipped abroad by common carrier from the City of New York. It was never used by the subsidiary in the United States. The rent which has been subjected to the gross receipts tax is a contract-prescribed percentage of what the subsidiary realized abroad from the exploitation of the film abroad.

The export of personal property for rental abroad is a growing activity. It is now a continuous practice of motion picture producers; and it undoubtedly exists and will grow in other industries which are seeking foreign rental markets for patented machinery and equipment.

In *Richfield Oil Corporation* v. *State Board of Equalization,* 329 U. S. 69, this Court said that a tax on the gross receipts from the export of goods was as much a violation of the import-export clause as a tax on the goods themselves. That was a case where title and possession

passed, and the right to compensation became fixed, as the goods were loaded into a vessel in Los Angeles harbor to commence their export journey. In the instant case, the compensation could not be determined until the completion of the export journey inasmuch as the rent which appellant was to receive depended upon the amount of the bailee's receipts from foreign exploitation.

The substantial federal question is whether a gross receipts tax on rentals arising out of an export transaction is as vicious as a gross receipts tax on the proceeds of an export sale. It is submitted that there is no valid constitutional distinction between the two. The tax is the same tax, except as to the years involved, which this Court struck down when applied to the gross receipts of a stevedoring company for loading ships in foreign commerce at New York City docks. *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422.

The second federal question seems to be a question of first impression. There was a written opinion by appellee's referee in his Bureau of Excise Taxes,—the referee before whom was made the record which constitutes the basis of the judicial proceedings below. That opinion has never been disclosed to appellant or its counsel. Yet, the court below, before deciding this case and over objection of appellant's counsel, asked for and received copies of that opinion from appellee's counsel and did not permit appellant's counsel to see them. The court below belatedly attempted to explain to this Court why it read the referee's opinion; but, as will hereinafter be shown, its explanation is a subterfuge and ought not to be acceptable even if true.

The second substantial federal question is therefore whether a state court may receive from the attorney for a litigant relevant documents which are not privileged and conceal their contents from the adversary's counsel. Appel-

lant believes that such a practice runs contrary to conceptions of judicial impartiality and ought to be an infringement on due process as guaranteed by the Fourteenth Amendment. An analogous, though not identical, action of a special master appointed by a federal court was noted with seeming disfavor by this Court in *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575, 578-579.

Raising the Constitutional Issue

The New York Court of Appeals, on appellant's application, has amended its remittitur to recite that the conflict of the local laws with the import-export clause of the Federal Constitution was presented and necessarily passed upon (R. 686). The application was necessary because neither court below had written an opinion. The same constitutional question was raised in appellant's petition which commenced the judicial proceeding (R. 12-13). It was the only ground urged by appellant in its briefs in either lower court to establish the illegality of the tax. It was also the only ground urged before the referee in the administrative proceeding which was the basis of the judicial proceeding. Appellant believes that the referee's opinion, if disclosed, would reveal that fact and would also reveal that the referee considered the point well taken.

The other constitutional question was raised by motion as soon as the lower courts, over the oral protest of counsel, received the referees' reports without disclosing their contents to appellant's counsel and without inserting them in the record (R. 693-701, 704-709).

The Facts as to the Tax

Appellant is a motion picture producer with its executive offices in the City of New York and its studio in Los Angeles (R. 189-190). It had contracts with subsidiaries

which rented appellant's film to theatres in foreign countries (Exhs. 3, 4, 5, 12, 13, 14, 15; R. 85, 47, 48, 99, 103, 106, 107). Under the contracts appellant was entitled to receive, for the use of its film, a prescribed portion of the foreign film rentals (R. 290-292, 317-319, 349-350, 363, 375-376, 395-396). It is those receipts which appellee's predecessor sought to tax.

After the taking of the testimony before a referee in appellee's Bureau of Excise Taxes which comprises the bulk of the record before this Court, appellee abandoned his claim to tax on the rentals for certain of the film shipped from New York City to Canada, Denmark and France and on film shipped abroad from points in the United States other than New York City, but continued to assert the tax on the following two categories of appellant's receipts:

(a) From the exploitation by Twentieth Century-Fox Inter-America, Inc. (hereinafter called "Inter-America") and its subsidiaries, in the Western Hemisphere other than the United States and Canada, of appellant's film shipped by appellant from New York City to such foreign countries (R. 55-58, 73-74, 267-276; Exh. 5).

(b) From the exploitation by Twentieth Century-Fox International Corporation (hereinafter called "International") and its subsidiaries, in the Eastern Hemisphere (and, for the first twenty-six days of 1946, in the Western Hemisphere other than the United States and Canada), of appellant's film shipped by appellant from New York City to such foreign countries (R. 56-58, 73-74, 267-276; Exhs. 3, 4).

There were two types of films so shipped abroad from a point within the City of New York—(a) black and white

film and (b) color film. The three years' receipts from black and white were $18,445,925.32 and the tax was $24,712.49. The corresponding figures for color film were $5,258,246.69 and $6,698.88 (Exhs. 2, 21; R. 85, 230).

The above mentioned receipts were paid by International under an agreement with appellant dated September 22, 1944 (Exh. 3)* as amended on January 26, 1946 (Exh. 4); and by Inter-America under an agreement with appellant dated January 26, 1946 (Exh. 5). Under Exhibit 3 International was to distribute appellant's product throughout the world except the United States and Canada (R. 284). Under Exhibits 4 and 5 the Western Hemisphere outside the United States and Canada was excluded from International's area of operations after January 26, 1946 and assigned to Inter-America (R. 306-307, 311). Since Exhibits 3 and 5 are not substantially different and the operations thereunder were identical, the use of the name "International" in the ensuing discussion means "International and Inter-America".

Appellant agreed to deliver to International at International's principal office in New York City or at such "other port or embarkation point" as might be designated by appellant from time to time (a) complete positive prints or duplicate negatives or lavenders, (b) copies of the dialogue and action continuities, (c) copies of cue sheets for all music used in the pictures, (d) the names of the literary properties upon which the productions were based and (e) the necessary number of still photographs for each production (R. 287-288, 293, 313-314, 320). The meaning of the terms "positive prints", "duplicate negatives", "lavenders" is not

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*When the page at which an exhibit was admitted has already been given in this statement, it will not be repeated if the exhibit is again mentioned. The information is readily ascertainable at index pages iii to vi at the front of the record before the Court.

vital to this proceeding although it is explained fully in the record (R. 52, 66-67, 70, 72). It is sufficient for present purposes that the terms all mean motion picture film.

International agreed to distribute the film in the territory assigned to it (R. 288, 314-315) and to make no alterations except such as were required by a board of censors or in order to conform to the peculiar racial or political prejudices likely to be encountered in the foreign country (R. 289, 316).

The gross receipts at issue are receipts under section Ninth of the two agreements (Exhs. 3, 5) and are appellant's share of the rentals derived by International and its subsidiaries from the exploitation of the film outside the United States (R. 118-119, 192, 258). Appellant will discuss black and white pictures and pictures in color separately because there was some difference in the physical handling of the two types of film.

In all cases the film for black and white pictures was made by De Luxe Laboratories, Inc. (hereinafter called "De Luxe") in the City of New York (R. 54-55), billed to appellant (R. 79-80, 85-86, 113, 143; Exh. 8; R. 83), paid for by appellant (R. 56, 62, 89, 91, 111, 143; Exh. 10; R. 92), packed by De Luxe and either delivered by De Luxe to customs brokers in New York City for immediate export outside the United States or delivered by De Luxe to the steamship dock in New York City for immediate export outside the United States or picked up by Air Express Agency at De Luxe's New York City laboratory for immediate export by air outside the United States (R. 55-57, 58, 61-62, 73-74, 81, 117-118). All shipping expenses were charged by De Luxe to appellant and paid by appellant (R. 62, 91, 113).

In no instance were the black and white films delivered to International or to Inter-America in the United States

or stored by them in the United States (R. 56, 73-74, 205, 219); nor were they delivered to anyone in the United States other than the foreign forwarders (R. 58, 73-74, 81).

So much for the handling of pictures in black and white, which yielded $18,449,925.32, or about 77.82%, of the $23,708,172.01 which appellee has taxed. The method of handling color film was as follows:

The color films were made by Technicolor, Inc. in California at appellant's expense, sent by Technicolor to De Luxe in New York (R. 57, 74, 208), which packed and shipped them abroad at appellant's expense in the same manner as black and white films (R. 57-58, 74). However, not every color film was exported as soon as it arrived in New York City (R. 188). Those which were not immediately exported were in three categories:

(a) Some were sent by De Luxe to an independent organization named "Titra" at Fort Lee, New Jersey, where they were "superimposed" at appellant's expense (R. 189, 206-208, 223-224). That means that Titra placed on the film, in the written language of the country for which it was destined, a translation of the English dialogue (R. 163-164). When this was done, Titra shipped the film back to De Luxe in New York City which exported it in the same manner as black and white and charged the shipping expense to appellant (R. 57-58, 74, 208).

(b) Sometimes import, censorship or currency restrictions in a foreign country prevented the immediate export of a color film (R. 157-158, 213-215, 223-224). In that case De Luxe sent the color film to an independent organization named "Bonded Film Storage" at Fort Lee, New Jersey, where it was held in storage until the foreign import permit could be obtained (*idem.*).

International paid the storage charges (R. 224). When the permit was obtained, Bonded Film Storage shipped the film back to De Luxe in New York City which immediately exported it at appellant's expense in the same manner as black and white (R. 185-186).

(c) Because of the high expense of ordering only a few color films at a time from Technicolor and of the delay in getting them, there arose a practice of ordering extra color films from time to time for the foreign market (R. 61, 153-154, 211, 219). When they were received by De Luxe in New York City it sent them to Bonded Film Storage at Fort Lee, New Jersey, until they were needed abroad (R. 153). International paid the storage charges (R. 224). When they were needed, Bonded Film Storage shipped them back to De Luxe in New York City which immediately exported them at appellant's expense in the same manner as black and white (R. 185-186).

The reason black and white film did not go to New Jersey is twofold: (i) All superimposing on black and white was done by De Luxe in New York City (R. 205, 219, 234). (ii) It was not necessary to hold black and white films in reserve inasmuch as a black and white film cost the same whether made alone or as part of a larger order and it could be made in a few hours (R. 205, 219).

As hereinbefore noted, the contracts required appellant to deliver certain incidentals to International (R. 287-288, 313-314). The tax is not assessed against what appellant got for the incidentals; but the Court may want to know how they were handled.

The dialogue and action continuities required by the contracts were prepared by appellant at its studio in Hollywood, California, and sent from there to the overseas office

of International which required them. (R. 190). Cue sheets were prepared by appellant in Hollywood, sent to appellant's legal department in New York City and shipped by the legal department to the foreign country where required (R. 190-191). The names of the literary properties upon which each production was based were sent abroad by appellant in a letter of advice whenever they were requested (R. 191).

The still photographs which are called for by the contracts were, until July 1, 1947, purchased by International from appellant in the United States and sent abroad (R. 191). After that date International purchased them from an independent laboratory and petitioner was not involved in the transaction (R. 191). In any event, the charges for still photographs, whether before or after July 1, 1947, are not part of the receipts involved in this proceeding (R. 192).

The Law as to the Tax

The decisive factor in this case is that none of the receipts which appellee has taxed were receipts from the use of the film in the United States (R. 192). The contracts did not authorize their use in the United States (R. 284-285, 311-312); they were not so used (R. 58, 73, 137-138, 185); and the receipts were all measured by the earnings of the film abroad (R. 192). These receipts did not arise, and could not have arisen, except as the result of *export* of the film. These facts were not disputed by appellee before the lower courts although, of course, he did not concede that they were decisive.

Neither appellee nor the Appellate Division nor the Court of Appeals has disclosed why he or it considers the receipts from International and Inter-America to be subject to the gross receipts tax. The referee's report, which would presumably throw some light on the matter (R. 21),

has been withheld with the approval of both lower courts although the Appellate Division hints strongly that the report is favorable to appellant (R. 682). Appellee's abandonment of his effort to tax receipts from petitioner's subsidiaries from the exploitation of film shipped by petitioner from New York City to Canada, Denmark and France under written contracts (Exhs. 12, 13, 14) identical to those with International (Exhs. 3, 5) makes his logic the more obscure, inasmuch as those shipments were handled in precisely the same manner as the shipments to International (R. 88, 96-106, 108).

Clause 2 of section 10 of Article I of the United States Constitution provides that:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws * * *."

The import-export clause is not to be confused with the commerce clause of the Constitution. Under the commerce clause, interstate commerce may be taxed so as to make it bear a fair share of the cost of local government. Not so, foreign commerce. *Richfield Oil Corporation* v. *State Board of Equalization,* 329 U. S. 69, 75-76 (1946): *Youngstown Sheet & Tube Co.* v. *Bowers,* 358 U. S. 534, 557-558 (1959).

It is submitted that the *Richfield* case is determinative of the issue presented here. There, Richfield, a California corporation, sold oil to the New Zealand government f. o. b. Los Angeles and delivered it in Los Angeles harbor on board a tanker supplied by the purchaser. The California State Board of Equalization contended that the passage of title from Richfield to New Zealand by delivery of the property in the City of Los Angeles was sufficient to enable it to collect a tax from Richfield measured by Richfield's gross receipts from the transaction. The tax, while denominated a

sales tax, was, as the Court recognized, a gross receipts tax payable by the seller, not by the buyer (pp. 83-84).

In holding the tax unconstitutional even though title and possession passed at Los Angeles, this Court said (pp. 82-83, 85):

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad. It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. The means of shipment are unimportant so long as the certainty of the foreign destination is plain.
>
> "It seems clear under the decisions which we have reviewed involving Article I, Section 9, Clause 5 of the Constitution that the commencement of the export would occur no later than the delivery of the oil into the vessel. As the meaning of 'export' is the same under that Clause and the Import-Export Clause (see *Brown* v. *Maryland*, *supra*, p. 445; *Turpin* v. *Burgess*, *supra*, p. 506), the same result follows here.
>
> * * * *

> "The prohibition contained in the Import-Export Clause against taxation on exports clearly involves more than a mere exemption from taxes laid specifically upon the exported goods themselves. That is true of the constitutional prohibition against federal taxes on exports. *United States* v. *Hvoslef, supra.* What was said there (p. 13) is equally applicable here: 'If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it.' And see *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama,* 288 U. S. 218."

The *Richfield* case, it will be noted, was an attempt to tax the gross receipts from the sale of goods which were exported, receipts which would have been realized by the seller even if the buyer had failed to export them. The Court said that the fact of export plus the reasonable certainty that the goods would be exported were sufficient to vitiate the tax. The import-export clause, the Court says, is more than a mere exemption from taxes laid specifically upon exported goods themselves. It is an exemption from tax on the receipts arising from the export. The Court reiterated that principle in *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422, where it held that the same tax which is before the Court in the instant case was unconstitutional when applied to the gross receipts of a stevedoring company for loading export goods on ships at docks in the City of New York.

The instant case, it is submitted, is even stronger than *Richfield* and *Carter & Weekes* for inhibiting the tax. The sole measure of these receipts, of the consideration received by appellant, was the amount of money which the films earned abroad. The contract conferred no authority on International to use the films in the United States (R. 284-

285, 311-312); they were not used by International in the United States (R. 58, 73, 137-138, 85); and there was no provision for any payment if they were wrongfully used in the United States (Exhs. 3, 4, 5). The goods *had to be* exported before the receipts which have been taxed could have arisen. That should be determinative of this case.

The main tenor of appellee's argument in his brief in the Court of Appeals seemed to be that possession of the films passed in the City of New York before they commenced their export journey. In the Appellate Division he had also argued that title to the films passed before the export journey commenced; but he did not press that contention in the Court of Appeals. Both arguments are erroneous; but it wouldn't matter anyhow. As this Court said in *Richfield,* the test is not where or when title or possession passes but, rather, whether "the certainty of the foreign destination is plain" (329 U. S. 83). Here, unlike *Richfield,* there would have been no receipts if there had been no export. At some risk of diverting attention from the decisive factor in this case, appellant will nevertheless explore the question of where and when title and possession passed.

As hereinabove shown, possession of black and white film was never in International before the goods started their export journey and, while on occasion color film was stored at International's expense while awaiting export, it always came back into appellant's possession to be exported. Appellee argued below that the fact that International gave the instructions as to how many black and white films were to be made and as to where they were to be shipped was evidence that, while in the custody of De Luxe, they were in the constructive possession of International. However, a customer always says what he wants and how he wants the goods to be delivered.

Moreover, the films never existed until De Luxe made them, so that it would seem apparent that, if possession ever passed from appellant to International, it could only have been at the moment of export, as in *Richfield*.

The distribution contract (Exhs. 3, 5) is poorly drawn, but an analysis of the contract will clearly disclose that title never passed and that there was nothing more than a rental to International of petitioner's film.

The New York Court of Appeals has said that a contract containing inconsistent provisions is to be interpreted, if possible, so as to give meaning to the whole, and that specific provisions take precedence over general provisions. *Muzak Corp.* v. *Taft Hotel Corp.*, 1 NY 2d 42, 46, 133 N. E. 2d 688, 690; *O'Keeffe* v. *City of New York*, 173 N. Y. 474, 480, 66 N. E. 194, 196; *Daly* v. *O'Rourke*, 172 N. Y. 447, 452, 65 N. E. 273, 274-275. With that principle in mind, appellant turns to the contract.

The contract is entitled "Motion Picture Purchase and Sale Agreement" (R. 282, 309). The agreement itself recites (R. 295, 322):

> "It is understood and agreed that International is not an agent or representative of Fox and that this agreement is intended as a purchase and sale agreement."

Other than the title and the above quoted provision, both of which are in general terms only and make no mention of films, there is nothing that could be construed to indicate that the films were being sold.

While appellant purported to "sell" the *right to exhibit* the film outside the United States and Canada (R. 284, 290, 311, 316), it is apparent that the exhibition rights were only licensed, for later on the contract says that such rights revert to appellant upon the termination of the agreement "as fully as though the same had never been acquired by International" (R. 298, 325). That provision was not

a precaution devoid of substance, for the agreement was terminable by either party on sixty days' notice to the other (R. 299, 326).

Furthermore, the right to exhibit may not be treated separately from the film itself for New York City excise tax purposes if, as here, the right to exhibit is worthless without possession of the film. *United Artists* v. *Taylor,* 273 N. Y. 334, 341, 7 N. E. 2d 254, 256. The *United Artists* case involved a contract for domestic film rental which was otherwise indistinguishable from the contract here. The court said (p. 341):

> "The transaction which is the subject of the tax under review consists of the transfer by the distributor to the exhibitor of the possession of corporeal property in the form of positive and negative prints of photoplays *with the license to use or exhibit them for a specified time.* The license to exhibit without the transfer of possession would be valueless. Together they are one transaction and constitute a sale within the definition of Local Law No. 24. In so far as this sale originates and is consummated in New York City, it is subject to the tax. In so far as the transfer of possession of the prints and the license to exhibit them is effected in territory outside the city, then no tax is applicable." (italics supplied)

In that case, the court was dealing with a local law imposing a sales tax. The law defined the term "sale" to include a rental.

When the contract in the instant case speaks of the film itself, it says that International may not sell, pledge, encumber or otherwise dispose of any of it (R. 286, 313). When the commercial exploitation of the film has been completed International must either return it to appellant or give appellant proof that it has been lost or destroyed (R. 289, 316). Those are the only provisions which men-

tion the film. They are not limitations that one imposes upon a buyer, upon a person who acquires title; they are limitations that one imposes upon a tenant, a bailee.

That the parties so understood is apparent from section NINTH, the section which prescribes the compensation which petitioner is to receive. After prescribing as compensation a percentage of International's receipts from the exploitation of the film abroad (R. 290-291, 317-318), the contract says (R. 291, 318):

> "International further agrees to pay to Fox *as additional rental* for the rights herein sold * * * the cost of all positive prints, dupe negatives, duplicating positive prints, lavenders and trailers, cost of dubbing, super-imposing, spotting, re-recording of sound tracks, titles, replacement or repair of prints or parts thereof and cost of shipping containers" (emphasis supplied).

Clearly, the contract contemplated only a *rental* by appellant to International. This is confirmed by the book entries—book entries which appellee himself insisted on placing in the record (R. 119-120, 121-123, 128-129, 130, 192, 195-196, 198-201, 258). The parties to the contract consistently entered these percentage payments in their books as "film rentals" (Exhs. N, O; R. 195). The parties' course of conduct over a long period resolves any doubt as to what they intended. *Muzak Corp.* v. *Taft Hotel Corp.*, 1 NY 2d 42, 46, 133 N. E. 2d 688, 690, *supra*.

Paragraph (e) of section 35 of the Restatement provides (1 Restatement of the Law of Contracts 319):

> "(e) If the conduct of the parties subsequent to a manifestation of intention indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation."

The Facts As to the Denial of Due Process

Neither of the lower courts has written an opinion in this proceeding. Appellee himself has not said on the record why he considers the tax to be due. The only opinions that have been written are those of appellee's referees in his Bureau of Excise Taxes,—one as to the liability for tax and the other as to the liability for penalties (R. 61, 542-543, 545, 553-555).

Appellee has been at pains to conceal the referees' reports from appellant and its counsel (R. 553-555). The record does, however, disclose that the written report of Referee Scalice, who presided over the administrative hearings with respect to liability for the tax (R. 37, 77, 132, 203, 233, 264), was approved by his immediate superior without change (R. 637-638). The Appellate Division, which read the Scalice report before rendering its final decision but did not let appellant or its counsel see it (R. 697), has used language indicating that the reports of both referees may have been favorable to appellant (R. 682).

In the Court of Appeals appellant contended that the reading of the referees' reports by the Appellate Division without disclosing their contents to appellant's counsel was a denial of due process of law (R. 700). It asked that court to order their insertion in the record and to direct a judicial review *de novo* (R. 701). That motion came on for argument at the same time as the appeal from the appellate division orders (R. 693-694, 704-705, 708-709).

It is undisputed that the following transpired at the oral argument:

The Chief Judge of the Court of Appeals asked counsel for appellant whether he had any objection to that court's receiving and reading the written reports of the referees. Appellant's counsel immediately replied that he objected to the court's receiving any papers relating to the proceeding

unless their contents were disclosed to appellant's counsel and were included in the record (R. 708).

Shortly thereafter the Chief Judge told appellee's counsel that the court would receive the reports anyhow; and appellee's counsel thereupon gave him seven copies of the referees' reports. The court did not request appellee's counsel to give counsel for appellant copies of what he had just given the court and appellant's counsel has never seen them (R. 709).

Thus the Court of Appeals read these referees' reports before rendering its decision. Simultaneously with the rendering of its decision it denied, without comment, appellant's motion to include the reports in the record (R. 684, 692; *infra*, p. 30). Thereafter, appellant made a motion to insert in the record what had transpired at the argument (R. 704-709). While not disputing appellant's version of what had transpired at the argument, the Court of Appeals avoided a direct response by saying that it had examined the referees' reports to determine whether they contained any evidence (R. 703; *infra*, p. 30).

That is the same language which the Appellate Division had used (R. 682); and it is a subterfuge. Every jurist well knows that a referee's report does not, and cannot, contain evidence. Appellant had already conceded in its brief before the Court of Appeals that the reports were not evidence. It said that it had never suggested to the lower court that they could contain any evidence. It urged only that they should have been in the record because they were part of the administrative record under review. It had said the same thing in the affidavit in support of the motion to include the reports in the record (R. 699).

Appellant's counsel, in his oral argument before the Court of Appeals, expressly disclaimed any contention that the reports could possibly contain any evidence. That was

before that court, over the protest of appellant's counsel, obtained copies of the reports.

Clearly, the Court of Appeals was not being frank when it said that the "reports were examined to determine whether they contained evidentiary matter" (R. 703).

The Law As to the Denial of Due Process

Appellant submits that it is wrong for a judicial tribunal, before rendering its decision, to examine admittedly relevant and unprivileged documents which it receives from the attorney for one of the parties without disclosing the contents of those documents to the adversary's attorney and without requiring their inclusion in the record. The action is the more to be condemned when, as here, the Court, aware of the problem, first asked the consent of appellant's counsel to what it proposed to do and, when counsel refused to consent, did it anyhow (R. 708-709). The action of the court certainly violates reasonable concepts of judicial impartiality. It should be considered a denial of due process of law within the meaning of the Fourteenth Amendment.

As hereinbefore noted, the case is one of first impression and there is no authority directly in point. In *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575, a federal court of appeals had appointed a special master to investigate into the circumstances surrounding a judgment allegedly obtained in that court through fraud. In the course of his investigation the master read grand jury records, records in the possession of the United States Attorney, bank records and statements of interested parties; but he did not permit the alleged wrong doer to see everything that he had read. This Court noted the fact with disapproval (328 U. S. 578-579) but reversed on another ground.

The closest case which appellant has found is *Mazza* v. *Cavicchia*, 15 N. J. 498, 105 A. 2d 545. In an administrative proceeding before the New Jersey Division of Alcoholic Beverage Control a hearing had been conducted before a "hearer" in the Division, who forwarded the record of the hearing and report of his findings and conclusions to the Director of the Division. Without disclosing the hearer's report to Mazza, the Director ordered his license suspended.

Through judicial proceedings similar to those here, Mazza carried the case to the Appellate Division of the Superior Court, which affirmed. In the New Jersey Supreme Court, he urged reversal because he had not been given a copy of the hearer's report and findings and conclusions. The Supreme Court reversed in an opinion by Chief Justice Vanderbilt saying in part:

> "The crucial point in the pending appeal is whether the failure to supply the appellant with a copy of the hearer's secret report to the Director constitutes reversible error." (15 N. J. 511, 105 A. 2d 553).
>
> * * *
>
> "We have not been able to find a single case in any state of the Union, nor have any been cited to us, justifying or attempting to justify the use of secret reports by a hearer to the head of an administrative agency. To approve such a practice in deciding an administrative controversy would be to confer on New Jersey the dubious distinction of being the only jurisdiction in the United States to ignore a fundamental element of due process and fair play." * * * (15 N. J. 519, 105 A. 2d 557)

The opinion is a lengthy one. In it, Chief Justice Vanderbilt reviews the decisions of this Court and concludes that this Court has never in fact passed on the question.

The case is not an exact precedent here inasmuch as the New Jersey court never saw the report which the administrative officer was concealing from the litigant. But if it is a denial of due process for the administrative officer to conceal the report, it would seem a clearer denial of due process for the court to read it and then to participate in the concealment.

Another strikingly similar situation arose in *Application of O'Meally* v. *Rohan, et al.*, 286 App. Div. 872, 142 N. Y. S. 2d 239. That too was a proceeding under Article 78 of the New York Civil Practice Act to review a determination of an administrative officer,—in that case a determination of the New York State Liquor Authority cancelling the petitioner's liquor license.

In setting aside the authority's determination, the court said (286 App. Div. 872-873, 142 N. Y. S. 2d 241):

> "We are also of the opinion that, for the reasons stated in Mazza v. Cavicchia, 15 N. J. 498, 511-526, 105 A. 2d 545, a copy of the hearing commissioner's report should be made available to petitioner, prior to action thereon by the respondents, and an opportunity afforded to controvert its findings or conclusions. See, also, Simmons v. United States, 348 U. S. 397, 75 S. Ct. 397; Gonzales v. United States, 348 U. S. 407, 75 S. Ct. 409."

That decision was by a different Appellate Division than the court in which the instant record was first reviewed.

CONCLUSION

This Court has jurisdiction of this appeal under Section 1257(2) of Title 28, United States Code. The federal questions presented are both substantial and novel.

Respectfully submitted,

WILLIAM W. OWENS
Attorney for Appellant

Dated: August 28, 1961

APPENDIX A

The Opinions of the Courts Below

Opinion of Appellate Division on Intermediate Order

8 AD 2d 714, 185 N. Y. S. 2d 838

(May 19, 1959)

By Botein, P. J.: Breitel, M. M. Frank, McNally and Stevens, JJ.

The determination with respect to penalties is annulled and the matter remanded to the Comptroller for his determination concerning what penalties, if any, should be imposed. In all other respects, the determination is confirmed, without costs. The questions presented relate to the validity of (1) the imposition of the tax; and (2) the imposition of the penalty. With respect to the imposition of the tax, we confirm the determination. The imposition of the penalty is not sustained by the record. The returns were timely filed. The deficiency notice is dated July 28, 1950. The application for a hearing is dated August 23, 1950. The hearing commenced on January 12, 1953, and terminated March 16, 1954. The notice of final determination is dated July 11, 1958, and includes penalty interest to February 16, 1956. It thus appears that from the time that the hearing was closed until the taxpayer was informed of the final determination of the tax more than four years elapsed, and the penalty interest imposed relates to two of these four years. While we do not attempt to determine what would constitute a reasonable time for the Comptroller to process the matter after close of hearings, on this record there is no showing that either two or four years is reasonable, and, under these circumstances, the imposition of a penalty measured thereby is unwarranted. We have held that the basis for the imposition of penalties should appear so that it may be reviewed under article 78 of the Civil Practice Act. (Matter of McCall Corp. v. Gerosa, 2 AD 2d 358, 361). Settle order on notice.

Appendix A

Opinion of Appellate Division on Final Order

10 AD 2d 827, 199 N. Y. S. 2d 92
(April 12, 1960)

By BOTEIN, P. J.: RABIN, M. M. FRANK, MCNALLY and STEVENS, JJ.

Determination unanimously confirmed and the petition dismissed, with $20 costs and disbursements to the respondent. The reports sought to be made part of the record by petitioner contain no evidentiary matter and merely represent opinions of subordinates which the Comptroller was not bound to follow. Order filed.

Opinion of Court of Appeals on Final Order and on Motion to Include the Referees' Reports in the Record

9 NY 2d 750 (March 2, 1961)

Orders affirmed, with costs; no opinion.

Motion for an order requiring the inclusion of two Referees' reports in the record on appeal denied.

Opinion of Court of Appeals on Motion to Amend Decision to Recite what had Occurred on Oral Argument before that Court

9 NY 2d 792 (March 23, 1961)

Motion to amend remittitur granted to the following extent: Return of remittitur requested and, when returned, it will be amended to state that the reports in question were examined by the court to determine whether they contained evidentiary matter and should have been included in the record. The court concluded that such reports merely represented opinions of subordinates of the Comptroller and were irrelevant to a decision of the controversy. Otherwise motion is denied.

APPENDIX B

The Statutes Involved

Chapter 338, Laws of 1946—The State Legislative Act under the Authority of which New York City Local Law No. 14 of 1946 was Enacted

CHAPTER 338

Section 1. Article two-B of chapter twenty-six of the laws of nineteen hundred nine, entitled "An act in relation to cities, constituting chapter twenty-one of the consolidated laws," consisting of sections twenty-four-a, twenty-four-b and twenty-four-c, such article having been added by chapter one hundred ninety-nine of the laws of nineteen hundred forty-one and section twenty-four-a thereof having been last amended by chapter six hundred ninety-six of the laws of nineteen hundred forty-five, is hereby amended and re-enacted to read as follows:

ARTICLE 2-B

GENERAL BUSINESS AND FINANCIAL TAX AUTHORIZATION

Section 24-a. Certain cities authorized to impose taxes on certain businesses.

24-b. Authority to impose other taxes; limitations.

24-c. Revenues; disposition of.

§ 24-a. **Certain cities authorized to impose taxes on certain businesses.** Notwithstanding any other provisions of law to the contrary, any city having a population of one million or more, acting through its local legislative body, until July first, nineteen hundred forty-nine, shall

have power to adopt and amend local laws imposing in any such city a tax upon persons carrying on or exercising for gain or profit within such city, any trade, business, profession, vocation or commercial activity, other than a financial business, or making sales to persons within such city, measured by the gross receipts from such activities carried on or sales made within the city, but not to exceed one-tenth of one per centum of such gross receipts, and upon persons carrying on within any such city, any financial business, measured by the gross income from such financial business carried on within such city, but not to exceed one-fifth of one per centum of such gross income. In any such city in which the functions of a chief fiscal officer are divided between two or more officials, any such local law may assign the respective functions of each such official in assessing and collecting the tax. Every such local law in terms shall be, substantially, as follows:

GENERAL BUSINESS AND FINANCIAL TAX

Section 1. **Definitions.** When used in this local law the following terms shall mean or include: 1. "Person." Includes an individual, partnership, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee or any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of individuals carrying on or exercising for gain any trade, business, profession, vocation, or commercial activity within the city.

2. "Financial business." The services and transactions of private banks, private bankers, dealers and brokers in money, credits, commercial paper, bonds, notes, securities and stocks, monetary metals, factors, and commission mer-

chants, and where the chief fiscal officer shall so determine as a fact, dealers in merchandise where the spread or difference between the cost of goods sold and the sale price is analogous to or in the nature of a commission and does not in any event exceed three per centum of the cost of goods sold, and such determination of fact by the chief fiscal officer shall be final.

3. "Receipts." The gross receipts received in, or by reason of any sale made or services rendered or commercial or business transaction had in the city, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service or other cost, interest or discount paid, or any other expense whatsoever, but shall not include receipts from the sales, services or transactions hereinafter in schedule A specified.

For the purpose of determining receipts from the business of insurance, such receipts shall be taken to mean receipts from premiums received from risks in the city, whether by mutual or stock companies, domestic or foreign, without any deductions therefrom for any cost or expense whatsoever. The chief fiscal officer shall determine from such data as he shall require from insurance companies subject to the provisions of this local law, the amount of such receipts and shall ascertain the amount of the tax in accordance with such determination. The business of insurance shall not be deemed to be a financial business.

SCHEDULE A

Receipts of the city, of the state of New York and of the government of the United States, only in so far as the receipts of the United States are immune from local taxation under the constitution of the United States.

Appendix B
Chapter 338, New York Laws of 1946

Receipts of charitable and religious corporations or associations whose income is exempted from taxation under the laws of the state of New York.

Receipts of national banking associations, banks, trust companies and mutual savings banks subject to the provisions of articles three, five, six and seven of the banking law of the state of New York.

Receipts of co-operative corporations organized under the provisions of the co-operative corporations laws of the state of New York, or agricultural co-operatives organized under the authority of the federal government.

Receipts from sales of real estate and/or rents derived from real estate.

Receipts of public utility corporations, if otherwise taxed on gross income or receipts pursuant to the authority granted by section twenty-b of the general city law, as amended, or by chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as amended.

Wages and salaries of individuals.

4. "Gross income." The total amount of receipts of a person engaged in a financial business, excluding the cost of property sold, or moneys or credits received in repayment of advances, credits and loans, but not to exceed the principal amount thereof and excluding deposits.

5. "Exercising any profession, vocation, trade, business or commercial activity" does not include labor or services rendered by an individual for a wage or salary.

6. "Sheriff." The sheriff of the county in which a city is located and, in a city containing more than one county, the sheriff of any county within the city.

Appendix B
Chapter 338, New York Laws of 1946

§ 2. **Imposition of tax.** a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city during each year, or any part thereof, commencing with July first of the year in which this local law shall take effect, every person shall pay an excise tax which shall be equal to one-tenth of one per centum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during each calendar year commencing with the calendar year during which this local law shall take effect, or as provided in subdivision c hereof; and for the privilege of carrying on any financial business, as defined in subdivision two of section one of this local law for gain or profit within the city during each year, or any part thereof, commencing with July first of the year in which this local law shall take effect, every person shall pay an excise tax which shall be equal to one-fifth of one per centum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during any calendar year commencing with the calendar year in which this local law shall take effect, or as provided in subdivision c hereof. However, there shall be no tax imposed on those trades, businesses, professions, vocations or commercial activities where the gross receipts do not exceed ten thousand dollars per annum, and no return need be filed.

b. Where a receipt in its entirety cannot be subjected to the tax imposed by this local law, by reason of the provisions of the constitution of the United States or any other provision of law, the chief fiscal officer shall establish rules

and regulations and/or methods of allocation and evaluation to the end that only that part of such receipt which is properly attributable and allocable to the doing of business in the city shall be taxed hereunder. The chief fiscal officer may make such allocation, with due regard to the nature of the business concerned, on the basis of mileage, division of the receipt according to the number of jurisdictions in which it may be taxed, the ratio of the value of the property or assets of the taxpayer owned and situated in the city to the total property or assets of the taxpayer wherever owned and situated and/or any other method or methods of allocation other than the foregoing calculated to effect a fair and proper allocation in accordance with the purposes of this subdivision b.

c. If a person subject to the tax imposed by this local law was not engaged in carrying on a profession, vocation, trade, business or commercial activity or financial business in the city during the whole of any calendar year referred to in subdivision a of this section, he shall pay the tax imposed by this local law measured by his receipts or gross income, as the case may be, during the period of one year subsequent to January first of the calendar year in question and not extending beyond June thirtieth of the year next succeeding such calendar year; and if such person shall not have been so engaged for an entire year prior to June thirtieth of the year next succeeding the calendar year in question, then measured by his receipts or gross income for the period during which he was so engaged.

d. If any person liable for the tax after July first, of the year in which this local law shall take effect, acquired the assets or franchises, of, or was merged or consolidated with another person, the person liable for the tax shall re-

port as its receipts or gross income by which the tax is to be measured, the receipts or gross income of such other person together with its own receipts or gross income as provided in this section.

§ 3. **Presumption and burden of proof.** For the purpose of the proper administration of this local law and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts are a proper measure of the tax until the contrary is established, and the burden of proving that any payment or consideration received by any person subject to the tax hereby imposed was not received in or by reason of a sale made or service rendered or transaction had in the city shall be upon the person who received it.

§ 4. **Filing of returns.** Every person subject to tax under this local law, on or before the fifteenth day of June, of each year, commencing with the year next succeeding the year in which this local law shall take effect, annually shall file a return under oath with the chief fiscal officer, except that any person required to file a return for a period beyond the first day of May, preceding the thirtieth day of June terminating a fiscal period, may file such return on or before the first day of August thereof. The chief fiscal officer, if he deems it necessary to insure the payment of the tax hereby imposed, may require returns of receipts from other persons. The forms of such returns shall be prescribed by the chief fiscal officer and shall contain such information as he may deem necessary for the proper administration of this local law; and the chief fiscal officer or his duly authorized agents or employees shall be empowered to require supplemental returns and to inspect the books and records of any person as defined in this local law pertaining to his receipts.

Appendix B
Chapter 338, New York Laws of 1940

§ 5. **Payment of tax.** At the time of filing a return as required by this local law each person shall pay to the chief fiscal officer the tax imposed by this local law. Such tax shall be due and payable on the last day on which such return is required to be filed, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of the tax due.

§ 6. **Determination of tax.** If a return required by this local law is not filed or if a return when filed is incorrect or insufficient, and the maker fails to file a corrected or sufficient return within twenty days after the same may be required by notice from the chief fiscal officer, the latter shall determine the amount of the tax due from such information as may be obtainable or on the basis of external indices, such as the number of employees of the person concerned, rentals paid by him, his stock on hand and/or other factors. Notice of such determination shall be given to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within thirty days, apply to the chief fiscal officer for a hearing on such determination, or unless the chief fiscal officer shall of his own motion redetermine such tax. After such hearing the chief fiscal officers shall give notice of his decision to the person liable for the tax. The determination of the chief fiscal officer shall be reviewable for error, illegality, unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice act if instituted within thirty days after the giving of the notice of such determination. Such proceeding shall not be instituted unless the amount of any tax sought to be reviewed with interest and penalties thereon, if any, shall have first been

deposited, and an undertaking filed, with the chief fiscal officer in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the proceedings.

§ 7. **Refunds.** In the manner herein provided the chief fiscal officer shall refund any tax, interest or penalty erroneously, illegally or unconstitutionally collected by or paid to him, under protest in writing, stating in detail the ground or grounds of the protest, if application to the chief fiscal officer therefor shall be made within one year from the payment thereof. For like cause and within the same period a refund may be so made on the initiative and order of the chief fiscal officer. Whenever a refund is made by the chief fiscal officer, on his own initiative or after a hearing by him, as herein provided, he shall state his reasons for the refund in writing. A person shall not be entitled to a hearing in connection with such application for a refund if he has already had a hearing or had been given the opportunity of a hearing as provided in section six of this local law. No refund shall be made of a tax, interest or penalty paid pursuant to a determination of the chief fiscal officer as provided in section six of this local law, unless the chief fiscal officer, after a hearing as in said section provided, or of his own motion, shall have reduced the tax or penalty, or it shall have been established in a proceeding, pursuant to article seventy-eight of the civil practice act that such determination was erroneous, illegal, unconstitutional or otherwise improper, in which event a refund with interest shall be made as provided upon the determination of such proceeding. An application to the chief fiscal officer for a re-

fund made as herein provided shall be deemed an application for a revision of any tax, interest or penalty complained of and the chief fiscal officer shall receive evidence with respect thereto. After making his determination the chief fiscal officer shall give notice thereof to the person interested who shall be entitled to maintain a proceeding under article seventy-eight of the civil practice act to review such determination if instituted within thirty days after such determination and an undertaking shall first be filed with the chief fiscal officer in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such order be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§ 8. **Reserves.** In cases where the taxpayer has paid any tax, interest or penalty under written protest stating in detail the ground or grounds therefor, has applied for a refund and has instituted proceedings under article seventy-eight of the civil practice act to review a determination adverse to him on his application for refund, or has deposited the amount of tax assessed in connection with proceedings under section six of this local law, the chief fiscal officer shall set up appropriate reserves to meet any decision adverse to the city.

§ 9. **Remedies exclusive.** The remedies provided by sections six and seven of this local law shall be the exclusive remedies available to any person for the review of tax liability imposed by this local law; and no determination or proposed determination of tax or determination on an application for refund shall be enjoined or reviewed by an action for declaratory judgment, an action for money

had and received, or by any legal or equitable action proceeding other than proceedings under article seven eight of the civil practice act; provided, however, tha taxpayer may proceed by declaratory judgment if he stitutes suit within thirty days after a deficiency assessm is made and pays the amount of the deficiency assessment the chief fiscal officer prior to the institution of such s and posts a bond for costs as provided in section six this local law.

§ 10. **Proceedings to recover tax.** a. Whenever a person shall fail to pay any tax, penalty, or interests posed by this local law, as herein provided, the chief officer shall, upon the request of the chief fiscal officer, br an action to enforce payment by the taxpayer, who shall personally liable for the same. If, however, the chief fis officer in his discretion believes that a taxpayer subj to the provisions of this local law is about to cease busine leave the state or remove or dissipate the assets out which the tax, interest or penalties might be satisfied a that any such tax, interest or penalty will not be paid wh due, he may declare such tax, interest or penalty to immediately due and payable and may issue a warr immediately.

b. As an additional or alternative remedy the ch fiscal officer may issue a warrant, directed to the she commanding him to levy upon and sell the real and perso property of such person which may be found within county, for the payment of the amount thereof, with penalties, interest and the cost of executing the warr and to return such warrant to the chief fiscal officer to pay him the money collected by virtue thereof wit sixty days after the receipt of such warrant. The she shall within five days after the receipt of the warrant,

with the clerk of his county a copy thereof and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax, penalties and interest for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued. The sheriff shall then proceed upon the warrant in the same manner and with like effect as that provided by law in respect to executions against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees which he may collect in the same manner. In the discretion of the chief fiscal officer a warrant of like terms, force and effect may be issued and directed to any officer or employee of his office, and in the execution thereof such officer or employee shall have all the power conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the chief fiscal officer may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city had recovered judgment therefor and execution thereon had been returned unsatisfied.

§ 11. **General powers of the chief fiscal officer.** In addition to the powers granted to the chief fiscal officer in this local law, he is authorized and empowered:

1. to make, adopt and amend rules and regulations appropriate to the carrying out of this local law and the purposes thereof;

2. To request information from the tax commission, superintendent of banks, superintendent of insurance and

other agencies of the state of New York or treasury department of the United States relative to any person, and to afford information to such tax commission or such treasury department relative to any person, any other provision in this local law to the contrary notwithstanding;

3. To extend, for cause shown, the time for filing any return for a period not exceeding thirty days; and, in his discretion, to remit penalties, but not interest at the rate of six per centum per annum; and to compromise disputed claims in connection with the taxes hereby imposed;

4. To require all persons doing business in the city to keep such records as he may prescribe;

5. To delegate his functions hereunder to a deputy or other employee or employees of his office;

6. To determine whether any trade, business, profession, vocation, or commercial activity shall be in whole or in part classified as financial business or otherwise; and in case any trade, business, profession, vocation or commercial activity shall be classified in part as financial business, to set forth the manner of computing the tax hereunder upon each part in accordance with such classification;

7. To prescribe methods for determining the amount of receipts and/or gross income received by reason of any sale made or service rendered or commercial or business transactions had;

8. To prescribe methods for determining allocations of receipts to the city.

§ 12. **Administration of oaths and compelling testimony.** a. The chief fiscal officer or his employee duly designated and authorized by him shall have power to

administer oaths and take affidavits in relation to any matter or proceeding in the exercise of his powers and duties under this local law. The chief fiscal officer shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this local law, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

b. A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the chief fiscal officer hereunder.

c. Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the chief fiscal officer hereunder shall be guilty of a misdemeanor, and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

d. The officers who serve the chief fiscal officer's summons or subpoena hereunder, and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided.

§ 13. **Penalties and interest.** a. Any person failing to file a return or to pay over any tax to the chief fiscal officer within the time required by this local law shall be subject to a penalty of five per centum of the amount of tax

due, plus interest at the rate of one per centum of such tax for each month of delay or fraction thereof excepting the first month, after such return was required to be filed or such tax becomes due; but the chief fiscal officer, if satisfied that the delay was excusable, may remit all or any part of such penalty, but not interest at the rate of six per centum per annum. Such penalty shall be paid and disposed of in the same manner as other revenues from this local law. Unpaid penalties and interest may be enforced in the same manner as the tax imposed by this local law.

b. Any person and any officer of a corporation or copartnership filing or causing to be filed any return, certificate, affidavit or statement required or authorized by this local law which is wilfully false and any person who shall fail to file a return as required under this local law, and the officers of any corporation which shall so fail, and any person and any officer of a corporation failing to keep the records required by subdivision four of section eleven of this local law shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment. The certificate of the chief fiscal officer to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this local law shall be prima facie evidence thereof.

§ 14. Notices and limitations of time. a. Any notice authorized or required under the provisions of this local law may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this local law or in any application

made by him, or, if no return has been filed or application made, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this local law by the giving of notice shall commence to run from the date of mailing of such notice.

b. The provisions of the civil practice act or any other law relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken by the city to levy, appraise, assess, determine or enforce the collection of any tax, interest, or penalty provided by this local law. However, except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return, provided, that where no return has been filed as provided by law the tax may be assessed at any time.

c. Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended, the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period.

§ 15. **Returns to be secret.** Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the chief fiscal officer or any officer or employee of his office, to divulge or make known in any manner the receipts or any other information relating to the business of a taxpayer contained in any return required under this local law. The officers charged with the

custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of any other city of the state authorized to impose a tax pursuant to section twenty-four-a of the general city law or on behalf of the state, the city or the chief fiscal officer or on behalf of any party to any action or proceeding under the provisions of this local law when the returns or facts shown thereby are directly involved in such action or proceeding in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof, or the inspection by the chief law officer of the city or other legal representatives of the city of the return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the chief fiscal officer orders them destroyed.

§ 16. **Separability.** If any provision of this local law or the application thereof to any person or circumstance is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances shall not be affected thereby.

§ 17. **Construction and enforcement.** This local law shall be construed and enforced in conformity with section

twenty-four-a of the general city law, pursuant to which this local law is enacted.

§ 24-b. **Authority to impose other taxes; limitations.** Nothing in this article contained shall limit the power of any city to adopt or amend local laws imposing the tax authorized by section twenty-b of this chapter, as amended, or by chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as amended.

Nothing in this article contained shall be construed to refer to or authorize a tax such as is authorized to be imposed by subdivision b of section one of chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as last amended, upon (a) the gross income of persons subject to the supervision of either division of the department of public service; (b) the gross income of persons engaged in the business of operating or leasing sleeping and parlor railroad cars or operating railroads other than street surface, rapid transit, subway and elevated railroads; (c) the gross operating income of persons engaged in the business of operating omnibuses with a carrying capacity of more than seven persons who are not subject to the supervision of either division of the department of public service; (d) the gross income of persons constructing, owning, operating, managing or leasing electrical subways, conduits, ducts, subsidiary connections or similar structures and equipment upon, above, or under any public or private street, public or private avenue, highway, public or private place, road or ground in any such city, through which are run electrical conductors, either low or high tension, by itself, or by any person engaged in the business of affording telephonic or telegraphic communication for hire or in the business of manufacturing, generating, distributing or transmitting electricity; or (e) the gross operating income of persons not subject to the supervision of either

division of the department of public service but furnishing or selling gas, electricity, steam, water, refrigeration, telephony or telegraphy, or furnishing or selling gas, electric, steam, water, refrigeration, telephone or telegraph service, or operating omnibuses (whether or not such operation is on the public streets), regardless of whether such furnishing or selling or operation constitutes the main activity of such person or is merely incidental thereto.

§ 24-c. **Revenues; disposition of.** Revenues resulting from the imposition of taxes authorized by this article two-b shall be paid into the treasury of the city imposing the same and may be credited to or deposited in the general fund of such city.

§ 2. This act shall take effect immediately.

NEW YORK CITY LOCAL LAW NO. 14 OF 1946

Under which Appellant's Gross Receipts in 1946 and 1947 were taxed

Section 1. Title RR of chapter forty-one of the administrative code of the city of New York, as added by local law number forty-seven for the year nineteen hundred forty-one, and as last amended by local law number nineteen for the year nineteen hundred forty-five, is hereby amended to read as follows:

TITLE RR

GENERAL BUSINESS AND FINANCIAL TAX

§ RR41-1.0 **Definitions.**—When used in this title the following terms shall mean or include:

1. "Person." Includes an individual, partnership, society, association, joint stock company, corporation, estate,

receiver, trustee, assignee, referee or any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of individuals carrying on or exercising for gain any trade, business, profession, vocation, or commercial activity within the city.

2. "Financial business." The services and transactions of private banks, private bankers, holding companies, dealers and brokers in money, credits, commercial paper, bonds, notes, securities and stocks, monetary metals, factors, and commission merchants, and where the comptroller shall so determine as a fact, dealers in merchandise where the spread or difference between the cost of goods sold and the sale price is analogous to or in the nature of a commission and does not in any event exceed three percentum of the cost of goods sold, and such determination of fact by the comptroller shall be final.

3. "Receipts." The gross receipts received, in or by reason of any sale made or services rendered or commercial or business transaction had in the city, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service or other cost, interest or discount paid, or any other expense whatsoever, but shall not include receipt from the sales, services or transactions hereinafter in schedule A specified.

For the purpose of determining receipts from the business of insurance, such receipts shall be taken to mean receipts from premiums received from risks in the city, whether by mutual or stock companies, domestic or foreign, without any deductions therefrom for any cost or expense whatsoever. The comptroller shall determine from such data as he shall require from insurance companies subject to the provisions of this title, the amount of such receipts

and shall ascertain the amount of the tax in accordance with such determination. The business of insurance shall not be deemed to be a financial business.

SCHEDULE A

Receipts of the city and state of New York and of the government of the United States, only in so far as the receipts of the United States are immune from local taxation under the constitution of the United States.

Receipts of charitable and religious corporations or associations whose income is exempted from taxation under the laws of the state of New York.

Receipts of national banking associations, banks, trust companies and mutual savings banks subject to the provisions of articles three, five, six and seven of the Banking Law of the state of New York.

Receipts of co-operative corporations organized under the provisions of the Co-operative Corporations Laws of the state of New York, or agricultural co-operatives organized under the authority of the federal government.

Receipts from sales of real estate and/or rents derived from real estate.

Receipts of public utility corporations, if otherwise taxed on gross income or receipts pursuant to the authority granted by chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as amended.

Wages and salaries of individuals.

4. "Gross income." The total amount of receipts of a person engaged in a financial business, excluding the cost of property sold, or moneys or credits received in repayment of advances, credits and loans, but not to exceed the principal amount thereof and excluding deposits.

Appendix B
New York City Local Law No. 14 of 1946

A broker who initiates, executes or clears a purchase or sales contract in conjunction with another broker may deduct from gross income any commissions paid by him to such other broker.

5. "Exercising any profession, vocation, trade, business or commercial activity." Does not include labor or services rendered by an individual for a wage or salary.

6. "Comptroller." The comptroller of the city.

7. "Treasurer." The treasurer of the city.

§ RR41-2.0 **Imposition of tax.**—a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city, during each year, or any part thereof, commencing with July first, nineteen hundred forty-one, and ending with June thirtieth, nineteen hundred forty-six, every person shall pay an excise tax which shall be equal to one-twentieth of one per centum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the respective calendar years nineteen hundred forty-one, nineteen hundred forty-two, nineteen hundred forty-three, nineteen hundred forty-four, and nineteen hundred forty-five, or as provided in subdivision c hereof; and for the privilege of carrying on any financial business, as defined in subdivision two of section RR41-1.0 of this title, for gain or profit within the city during each year, or any part thereof, commencing with July first, nineteen hundred forty-one, and ending with June thirtieth, nineteen hundred forty-six, every person shall pay an excise tax which shall be equal to one-tenth

of one percentum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during the respective calendar years nineteen hundred forty-one, nineteen hundred forty-two, nineteen hundred forty-three, nineteen hundred forty-four, and nineteen hundred forty-five, or as provided in subdivision c hereof; and for the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city, during each year, or any part thereof, commencing with July first, nineteen hundred forty-six and ending with June thirtieth, nineteen hundred forty-nine, every person shall pay an excise tax which shall be equal to one-tenth of one percentum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the respective calendar years nineteen hundred forty-six, nineteen hundred forty-seven and nineteen hundred forty-eight, or as provided in subdivision c hereof; and for the privilege of carrying on any financial business, as defined in subdivision two of section RR41-1.0 of this title, for gain or profit within the city during each year, or any part thereof, commencing with July first, nineteen hundred forty-six, and ending with June thirtieth, nineteen hundred forty-nine, every person shall pay an excise tax which shall be equal to one-fifth of one percentum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during the respective calendar years nineteen hundred forty-six, nineteen hundred forty-seven, and nineteen hundred forty-eight, or as provided in subdivision c hereof. However, there shall be no tax im-

posed on those trades, businesses, professions, vocations or commercial activities where the gross receipts do not exceed ten thousand dollars per annum, and no return need be filed.

b. Where a receipt in its entirety cannot be subjected to the tax imposed by this title by reason of the provisions of the constitution of the United States or any other provision of law, the comptroller shall establish rules and regulations and/or methods of allocation and evaluation to the end that only that part of such receipt which is properly attributable and allocable to the doing of business in the city shall be taxed hereunder. The comptroller may make such allocation, with due regard to the nature of the business concerned, on the basis of mileage, division of the receipt according to the number of jurisdictions in which it may be taxed, the ratio of the value of the property or assets of the taxpayer owned and situated in the city to the total property or assets of the taxpayer wherever owned and situated and/or any other method or methods of allocation other than the foregoing calculated to effect a fair and proper allocation in accordance with the purposes of this subdivision.

c. If a person subject to the tax imposed by this title was not engaged in carrying on a profession, vocation, trade, business or commercial activity or financial business in the city during the whole of any calendar year referred to in subdivision a of this section, he shall pay the tax imposed by this title measured by his receipts or gross income, as the case may be, during the period of one year, commencing on a date subsequent to January first of the calendar year in question and not extending beyond June thirtieth of the year next succeeding such calendar year; and if such

person shall not have been so engaged for an entire year prior to June thirtieth of the year next succeeding the calendar year in question, then measured by his receipts or gross income for the period during which he was so engaged.

d. If any person liable for the tax after July first, nineteen hundred forty-one, acquired the assets or franchises of, or was merged or consolidated with another person, the person liable for the tax shall report as its receipts or gross income by which the tax is to be measured, the receipts or gross income of such other person together with its own receipts or gross income as provided in this section.

§ RR41-3.0 **Presumption and burden of proof.**—For the purpose of the proper administration of this title and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts are a proper measure of the tax until the contrary is established, and the burden of proving that any payment or consideration received by any person subject to the tax hereby imposed was not received in or by reason of a sale made or service rendered or transaction had in the city shall be upon the person who received it.

§ RR41-4.0 **Filing of returns.**—Every person subject to tax under this title shall on or before the fifteenth day of June of each of the years nineteen hundred forty-two to nineteen hundred forty-nine, file returns embracing the receipts for each day of the calendar year nineteen hundred forty-one to and including nineteen hundred forty-eight, respectively, under oath with the treasurer, except that any person required by the provisions of subdivision c of section RR41-2.0 to file a return for a period beyond the first day of May following any of the calendar years

hereinabove in this section mentioned, may file such return on or before the first day of August thereafter. The comptroller, if he deems it necessary to insure the payment of the tax hereby imposed, may require returns of receipts from other persons. The forms of such returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this title; and the comptroller or his duly authorized agents or employees shall be empowered to require supplemental returns. Whenever the comptroller shall require supplemental returns, he shall promptly notify the treasurer thereof. If a return required by this title, by title O, by title R, by articles eight to twelve, inclusive, of title E of chapter forty-one of the code or by local law number four for the year nineteen hundred thirty-eight is not filed or if a return when filed is incorrect or insufficient on its face the treasurer shall take the necessary steps to enforce the filing of such a return or of a corrected return.

§ RR41-5.0 **Payment of tax.**—At the time of filing a return as required by this title each person shall pay to the treasurer the tax imposed by this title. Such tax shall be due and payable on the last day on which such return is required to be filed, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of the tax due.

§ RR41-6.0 **Determination of tax.**—If a return required by this title or by title O, by title R, or by articles eight to twelve, inclusive, of title E of chapter forty-one of the code, or by local law number four of nineteen hundred thirty-eight is not filed or if a return when filed is incorrect or insufficient, and the maker fails to file a corrected or

sufficient return within twenty days after the same may be required by notice from the comptroller, the comptroller shall determine the amount of the tax due from such information as may be obtainable or on the basis of external indices, such as the number of employees of the person concerned, rentals paid by him, his stock on hand and/or other factors. Notice of such determination shall be given to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within thirty days, apply to the comptroller for a hearing on such determination, or unless the comptroller shall of his own motion redetermine such tax. After such hearing the comptroller shall give notice of his decision to the person liable for the tax. The determination of the comptroller shall be reviewable for error, illegality, unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the Civil Practice Act if instituted within thirty days after the giving of the notice of such determination. Such proceeding shall not be instituted unless the amount of any tax sought to be reviewed with interest and penalties thereon, if any, shall have first been deposited with the treasurer and an undertaking filed with the comptroller in such amount and with such sureties as a justice of the Supreme Court shall approve, to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the proceedings. The comptroller shall notify the treasurer of all final determinations.

§ RR41-7.0 **Refunds.**—In the manner herein provided the treasurer upon the order of the comptroller shall refund any tax, interest or penalty erroneously, illegally or

unconstitutionally collected by or paid to him, under protest in writing, stating in detail the ground or grounds of the protest, if application to the comptroller therefor shall be made within one year from the payment thereof. For like cause and within the same period a refund may be so made on the initiative and order of the comptroller. Whenever a refund is made by the treasurer, pursuant to the order of the comptroller on the comptroller's own initiative or after a hearing by the comptroller as herein provided, the comptroller shall state his reasons for the refund in writing. A person shall not be entitled to a hearing in connection with such application for a refund if he has already had a hearing or had been given the opportunity of a hearing as provided in section RR41-6.0 of this title. No refund shall be made of a tax, interest or penalty paid pursuant to a determination of the comptroller as provided in section RR41-6.0 of this title, unless the comptroller, after a hearing as in said section provided, or of his own motion, shall have reduced the tax or penalty, or it shall have been established in a proceeding, pursuant to article seventy-eight of the Civil Practice Act that such determination was erroneous, illegal, unconstitutional or otherwise improper, in which event a refund with interest shall be made as provided upon the determination of such proceeding. An application to the comptroller for a refund made as herein provided shall be deemed an application for a revision of any tax, interest or penalty complained of and the comptroller shall receive evidence with respect thereto. After making his determination the comptroller shall give notice thereof to the person interested who shall be entitled to maintain a proceeding under article seventy-eight of the Civil Practice Act to review such determination if instituted within thirty days after such determination and an undertaking shall first be filed with

the comptroller in such amount and with such sureties as a justice of the Supreme Court shall approve, to the effect that if such order be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§ RR41-8.0 **Reserves.**—In cases where the taxpayer has paid any tax, interest or penalty under written protest stating in detail the ground or grounds therefor, has applied for a refund and has instituted proceedings under article seventy-eight of the Civil Practice Act to review a determination adverse to him on his application for refund or has deposited the amount of tax assessed in connection with proceedings under section RR41-6.0 of this title, the comptroller shall set up appropriate reserves to meet any decision adverse to the city.

§ RR41-9.0 **Remedies exclusive.** — The remedies provided by sections RR41-6.0 and RR41-7.0 of this title shall be the exclusive remedies available to any person for the review of tax liability imposed by this title or by title O, by title R, or by articles eight to twelve, inclusive, of title E of chapter forty-one of the code, or by local law number four of nineteen hundred thirty-eight; and no determination or proposed determination of tax or determination on an application for refund shall be enjoined or reviewed by an action for declaratory judgment, an action for money had and received, or by any legal or equitable action or proceeding other than a proceeding under article seventy-eight of the Civil Practice Act; provided, however, that a taxpayer may proceed by declaratory judgment if he institutes suit within thirty days after a deficiency assessment is made and pays the amount of the deficiency assessment to the

treasurer prior to the institution of such suit and posts a bond for costs as provided in section RR41-6.0 of this title.

§ RR41-10.0 **Proceedings to recover tax.**—a. Whenever any person shall fail to pay any tax, penalty, or interest imposed by this title as therein provided, the corporation counsel shall, upon the request of the comptroller or treasurer, bring an action to enforce payment by the taxpayer, who shall be personally liable for the same. If, however, the treasurer in his discretion believes that a taxpayer subject to the provisions of this title is about to cease business, leave the state or remove or dissipate the assets out of which the tax, interest or penalties might be satisfied and that any such tax, interest or penalty will not be paid when due, he may declare such tax, interest or penalty to be immediately due and payable and may issue a warrant immediately.

b. As an additional or alternative remedy the treasurer may issue a warrant, directed to the city sheriff, commanding him to levy upon and sell the real and personal property of such person which may be found within the city, for the payment of the amount thereof, with any penalties, interest and the cost of executing the warrant and to return such warrant to the treasurer and to pay him the money collected by virtue thereof within sixty days after the receipt of such warrant. The city sheriff shall within five days after the receipt of the warrant, file with the county clerk a copy thereof and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax, penalties and interest for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed

shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued. The city sheriff shall then proceed upon the warrant in the same manner and with like effect as that provided by law in respect to executions against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees which he may collect in the same manner. In the discretion of the treasurer a warrant of like terms, force and effect may be issued and directed to any officer or employee or the department of finance, and in the execution thereof such officer or employee shall have all the power conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the treasurer may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city had recovered judgment therefor and execution thereon had been returned unsatisfied.

c. Whenever there is made a sale, transfer or assignment in bulk of any part or the whole of a stock of merchandise or of fixtures, or merchandise and of fixtures pertaining to the conducting of the business of the seller, transferrer or assignor, otherwise than in the ordinary course of trade and in the regular prosecution of said business, the purchaser, transferee or assignee shall at least ten days before taking possession of such merchandise, fixtures, or merchandise and fixtures, or paying therefor, notify the comptroller by registered mail of the proposed sale and of the price, terms and conditions thereof, whether or not the seller, transferrer or assignor, has represented to, or informed the purchaser, transferee or assignee that

it owes any tax pursuant to this title, title O, title R, or articles eight to twelve, inclusive, of title E of chapter forty-one of the code or local law number four for the year nineteen hundred thirty-eight, whether or not the purchaser, transferee or assignee has knowledge that such taxes are owing, and whether or not any such taxes are in fact owing.

Whenever the purchaser, transferee or assignee shall fail to give the notice to the comptroller required by the preceding paragraph, or whenever the comptroller shall inform the purchaser, transferee or assignee that a possible claim for such tax or taxes exists, any sums of money, property or choses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller, transferrer or assignor shall be subject to a first priority right and lien for any such taxes theretofore or thereafter determined to be due from the seller, transferrer or assignor to the city, and the purchaser, transferee or assignee is forbidden to transfer to the seller, transferrer or assignor any such sums of money, property or choses in action to the extent of the amount of the city's claim. For failure to comply with the provisions of this subdivision the purchaser, transferee or assignee, in addition to being subject to the liabilities and remedies imposed under the provisions of section forty-four of the Personal Property Law, shall be personally liable for the payment to the city of any such taxes theretofore or thereafter determined to be due to the city from the seller, transferrer or assignor and such liability may be assessed and enforced in the same manner as the liability for tax is imposed under this title.

§ RR41-11.0 **General powers of the comptroller.**— In addition to the powers granted to the comptroller in this title, he is hereby authorized and empowered:

Appendix B
New York City Local Law No. 14 of 1946

1. To make, adopt and amend rules and regulations appropriate to the carrying out of this title and the purposes thereof;

2. To request information from the tax commission, superintendent of banks, superintendent of insurance and other agencies of the state of New York or treasury department of the United States relative to any person, and to afford information to such tax commission or such treasury department relative to any person, any other provision in this title to the contrary notwithstanding;

3. To extend, for cause shown, the time for filing any return for a period not exceeding thirty days, in which case he shall notify the treasurer thereof; and, in his discretion, to remit penalties, but not interest at the rate of six per cent per annum; and to compromise disputed claims in connection with the taxes hereby imposed;

4. To require all persons doing business in the city to keep such records as he may prescribe;

5. To delegate his functions hereunder to a deputy comptroller and other employee or employees of the comptroller's office and, with the consent of the treasurer, to the treasurer or employees of the department of finance;

6. To determine whether any trade, business, profession, vocation, or commercial activity shall be in whole or in part classified as financial business or otherwise; and in case any trade, business, profession, vocation or commercial activity shall be classified in part as financial business, to set forth the manner of computing the tax hereunder upon each part in accordance with such classification;

7. To prescribe methods for determining the amount of receipts and/or gross income received by reason of any sale

made or service rendered or commercial or business transaction had;

8. To prescribe methods for determining allocations of receipts to the city.

§ RR41-12.0 **General powers of the treasurer.**—In addition to the powers granted to the treasurer in this title he is hereby authorized and empowered:

1. To delegate his functions hereunder to a deputy treasurer or other employee or employees of the department of finance; and, with the consent of the comptroller, to the comptroller or any of his employees;

2. To extend, for cause shown, the time of filing any return for a period not exceeding thirty days; and in such event promptly to notify the comptroller of any extensions;

3. To request information from the tax commission, superintendent of banks, superintendent of insurance and other agencies of the state of New York and of agencies of the United States relative to any person; and to afford information to the tax commission and treasury department relative to any person, any other provision of this title to the contrary notwithstanding.

§ RR41-13.0 **Administration of oaths and compelling testimony.**—a. The comptroller or treasurer or his employee duly designated and authorized by him shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of their powers and duties under this title. The comptroller or treasurer shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of

his duties hereunder and of the enforcement of this title, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

b. A justice of the Supreme Court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller or treasurer hereunder.

c. Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the comptroller or treasurer hereunder shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

d. The officers who serve the comptroller's or treasurer's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided. Such officers shall be the city sheriff, and his duly appointed deputies, or any officers or employees of the office of the comptroller or of the treasurer, designated to serve such process.

§ RR41-14.0 **Penalties and interest.**—a. Any person failing to file a return or to pay over any tax to the treasurer within the time required by this title shall be subject to a penalty of five percentum of the amount of

tax due, plus interest at the rate of one percentum of such tax for each month of delay or fraction thereof excepting the first month, after such return was required to be filed or such tax becomes due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty, but not interest at the rate of six percentum per annum. Such penalty shall be paid and disposed of in the same manner as other revenues from this title. Unpaid penalties and interest may be enforced in the same manner as the tax imposed by this title.

b. Any person and any officer of a corporation or co-partnership filing or causing to be filed any return, certificate, affidavit or statement required or authorized by this title which is wilfully false and any person who shall fail to file a return as required under this title, and the officers of any corporation which shall so fail, and any person and any officer of a corporation failing to keep the records required by subdivision four of section RR41-11.0 of this title shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment. The certificate of the treasurer to the effect that a tax has not been paid, that a return has not been filed or that information has not been supplied pursuant to the provisions of this title shall be prima facie evidence thereof.

§ RR41-15.0 **Notices and limitations of time.**—a. Any notice authorized or required under the provisions of this title may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this title or

in any application made by him, or, if no return has been filed or application made, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this title by the giving of notice shall commence to run from the date of mailing of such notice.

b. The provisions of the Civil Practice Act or any other law relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken by the city to levy, appraise, assess, determine or enforce the collection of any tax, interest or penalty provided by this title. However, except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax imposed under a local law enacted subsequent to July first, nineteen hundred thirty-eight shall be made after the expiration of more than three years from the date of the filing of a return provided, that where no return has been filed as provided by law the tax may be assessed at any time.

c. Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended, the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period.

§ RR41-16.0 **Returns to be secret.**—Except in accordance with proper judicial order or as otherwise provided

by law, it shall be unlawful for the comptroller or treasurer or any officer or employee of the comptroller's office or the department of finance to divulge or make known in any manner the receipts or any other information relating to the business of a taxpayer contained in any return required under this title. The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the state, the city or the comptroller or treasurer or on behalf of any party to any action or proceeding under the provisions of this title when the returns or facts shown thereby are directly involved in such action or proceeding in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the fact shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof, or the inspection by the corporation counsel of the city or other legal representatives of the city of the return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller and treasurer permit them to be destroyed.

§ RR41-17.0 **Separability.**—If any provision of this title, or the application thereof to any person or circumstances is held invalid, the remainder of this title, and the

application of such provisions to other persons or circumstances shall not be affected thereby.

§ RR41-18.0 **Construction and enforcement.**—This title shall be construed and enforced in conformity with sections twenty-four-a, twenty-four-b, and twenty-four-c of the General City Law, pursuant to which it is enacted.

§ 2. This local law shall take effect July first, nineteen hundred forty-six.

Chapter 489, Laws of 1948—The State Legislative Act under the Authority of which New York City Local Law No. 44 of 1948 was Enacted

[Except for the portions set forth below, which have the effect of doubling the maximum permissible rate of tax, this statute is identical to Chapter 338, New York Laws of 1946, *supra* pp. 31-49]

CHAPTER 489

Section 1. Article two-B of the general city law, consisting of sections twenty-four-a, twenty-four-b and twenty-four-c, such article having been added by chapter one hundred ninety-nine of the laws of nineteen hundred forty-one and last amended by chapter three hundred thirty-eight of the laws of nineteen hundred forty-six, is hereby amended and re-enacted to read as follows:

ARTICLE 2-B

GENERAL BUSINESS AND FINANCIAL TAX AUTHORIZATION

Section 24-a. Certain cities authorized to impose taxes on certain businesses.

Appendix B
Chapter 489, New York Laws of 1948

24-b. Authority to impose other taxes; limitations.

24-c. Revenues; disposition of.

§ 24-a. *Certain cities authorized to impose taxes on certain businesses.* Notwithstanding any other provisions of law to the contrary, any city having a population of one million or more, acting through its local legislative body, shall have power to adopt and amend local laws imposing in any such city a tax upon persons carrying on or exercising for gain or profit within such city, any trade, business, profession, vocation or commercial activity, other than a financial business, or making sales to persons within such city, measured by the gross receipts from such activities carried on or sales made within the city, but not to exceed one-fifth of one per centum of such gross receipts, and upon persons carrying on within any such city, any financial business, measured by the gross income from such financial business carried on within such city, but not to exceed two-fifths of one per centum of such gross income. In any such city in which the functions of a chief fiscal officer are divided between two or more officials, any such local law may assign the respective functions of each such official in assessing and collecting the tax. Every such local law in terms shall be, substantially, as follows:

GENERAL BUSINESS AND FINANCIAL TAX

* * * * * *

§ 2. **Imposition of tax.** a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity

other than a financial business, or of making sales to persons within such city, during each year, or any part thereof, commencing with July first of the year in which this local law shall take effect, every person shall pay an excise tax which shall be equal to one-fifth of one per centum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during each calendar year commencing with the calendar year during which this local law shall take effect, or as provided in subdivision c hereof; and for the privilege of carrying on any financial business, as defined in subdivision two of section one of this local law for gain or profit within the city during each year, or any part thereof, commencing with July first of the year in which this local law shall take effect, every person shall pay an excise tax which shall be equal to two-fifths of one per centum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during any calendar year commencing with the calendar year in which this local law shall take effect, or as provided in subdivision c hereof. However, there shall be no tax imposed on those trades, businesses, professions, vocations or commercial activities where the gross receipts do not exceed ten thousand dollars per annum, and no return need be filed.

* * * * * *

NEW YORK CITY LOCAL LAW No. 44 OF 1948

Under which Appellant's Gross Receipts in 1948 were taxed

Section 1. Subdivision a of section RR41-2.0 of title RR of chapter forty-one of the administrative code of

the city of New York, as last amended by local law number fourteen for the year nineteen hundred forty-six, is hereby amended to read as follows:

a. For the privilege of carrying on or exercising for gain or profit within the city, any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city, during each year, or any part thereof, commencing with July first, nineteen hundred forty-one, and ending with June thirtieth, nineteen hundred forty-six, every person shall pay an excise tax which shall be equal to one-twentieth of one per centum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the respective calendar years nineteen hundred forty-one, nineteen hundred forty-two, nineteen hundred forty-three, nineteen hundred forty-four, and nineteen hundred forty-five, or as provided in subdivision c hereof; and for the privilege of carrying on any financial business, as defined in subdivision two of section RR41-1.0 of this title, for gain or profit within the city during each year, or any part thereof, commencing with July first, nineteen hundred forty-one, and ending with June thirtieth, nineteen hundred forty-six, every person shall pay an excise tax which shall be equal to one-tenth of one per centum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during the respective calendar years nineteen hundred forty-one, nineteen hundred forty-two, nineteen hundred forty-three, nineteen hundred forty-four, and nineteen hundred forty-five, or as provided in subdivision c hereof; and for the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or com-

mercial activity other than a financial business, or of making sales to persons within such city, during each year, or any part thereof, commencing with July first, nineteen hundred forty-six and ending with June thirtieth, nineteen hundred forty-eight, every person shall pay an excise tax which shall be equal to one-tenth of one per centum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the respective calendar years nineteen hundred forty-six and nineteen hundred forty-seven, or as provided in subdivision c hereof; and for the privilege of carrying on any financial business, as defined in subdivison two of section RR41-1.0 of this title, for gain or profit within the city during each year, or any part thereof, commencing with July first, nineteen hundred forty-six, and ending with June thirtieth, nineteen hundred forty-eight every person shall pay an excise tax which shall be equal to one-fifth of one per centum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during the respective calendar years nineteen hundred forty-six and nineteen hundred forty-seven, or as provided in subdivision c hereof. However, there shall be no tax imposed on those trades, businesses, professions, vocations or commercial activities where the gross receipts do not exceed ten thousand dollars per annum, and no return need be filed.

§ 2. Section RR41-4.0 of chapter forty-one of the said administrative code, as last amended by local law number fourteen for the year nineteen hundred forty-six, is hereby amended to read as follows:

Appendix B
New York City Local Law No. 44 of 1948

§ RR41-4.0 **Filing of returns.**—Every person subject to tax under this title shall on or before the fifteenth day of June of each of the years nineteen hundred forty-two to nineteen hundred forty-eight, file returns embracing the receipts for each of the calendar years nineteen hundred forty-one to and including nineteen hundred forty-seven, respectively, under oath with the treasurer, except that any person required by the provisions of subdivision c of section RR41-2.0 to file a return for a period beyond the first day of May following any of the calendar years hereinabove in this section mentioned, may file such return on or before the first day of August thereafter. The comptroller, if he deems it necessary to insure the payment of the tax hereby imposed, may require returns of receipts from other persons. The forms of such returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this title; and the comptroller or his duly authorized agents or employees shall be empowered to require supplemental returns. Whenever the comptroller shall require supplemental returns, he shall promptly notify the treasurer thereof. If a return required by this title, by title O, by title R, by articles eight to twelve, inclusive, of title E of chapter forty-one of the code or by local law number four for the year nineteen hundred thirty-eight is not filed or if a return when filed is incorrect or insufficient on its face the treasurer shall take the necessary steps to enforce the filing of such a return or of a corrected return.

§ 3. Such code is hereby amended by adding thereto a new chapter, to follow chapter forty-five, to be chapter forty-six, to read as follows:

Appendix B
New York City Local Law No. 44 of 1948

CHAPTER 46

Special City Taxes

TITLE B

General Business and Financial Tax

[What follows is a redesignation of former title RR of chapter 41 of the Administrative Code of the City of New York by making it title B of Chapter 46. Except for the portions set forth below, which double the tax and prescribe its effective date, and except that each section number is preceded by "B46" instead of by "RR41", this part is identical to New York City Local Law No. 14 of 1946, *supra* pp. 49-69.]

* * * * * *

§ B46-2.0 **Imposition of tax.**—a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city, for each of the periods of one year, or any part thereof, commencing with July first, nineteen hundred forty-eight, and for each year thereafter commencing July first, every person shall pay an excise tax which shall be equal to one-fifth of one per centum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year in which each such period of one year shall commence, or as provided in subdivision c hereof; and for the privilege of carrying on any financial business, as defined in subdivision two of section B46-1.0 of this title, for gain or profit within the city for each of the periods of one year,

or any part thereof, commencing with July first, nineteen hundred forty-eight, and for each year thereafter commencing July first, every person shall pay an excise tax which shall be equal to two-fifths of one per centum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during the calendar year in which each such period of one year shall commence, or as provided in subdivision c hereof. However, there shall be no tax imposed on those trades, businesses, professions, vocations or commercial activities where the gross receipts do not exceed ten thousand dollars per annum, and no return need be filed.

* * * * * *

§ B46-6.0 **Determination of tax.**—If a return required by this title is not filed or if a return when filed is incorrect or insufficient, and the maker fails to file a corrected or sufficient return within twenty days after the same may be required by notice from the comptroller, the comptroller shall determine the amount of the tax due from such information as may be obtainable or on the basis of external indices, such as the number of employees of the person concerned, rentals paid by him, his stock on hand and/or other factors. Notice of such determination shall be given to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within thirty days, apply to the comptroller for a hearing on such determination, or unless the comptroller shall of his own motion redetermine such tax. After such hearing the comptroller shall give notice of his decision to the person liable for the tax. The determination of the comptroller shall be review-

able for error, illegality, unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the Civil Practice Act if instituted within thirty days after the giving of the notice of such determination. Such proceeding shall not be instituted unless the amount of any tax sought to be reviewed with interest and penalties thereon, if any, shall have first been deposited with the treasurer and an undertaking filed with the comptroller in such amount and with such sureties as a justice of the Supreme Court shall approve, to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the proceedings. The comptroller shall notify the treasurer of all final determinations.

* * * * *

§ B46-18.0 **Construction and enforcement.**—This title shall be construed and enforced in conformity with sections twenty-four-a, twenty-four-b, and twenty-four-c of the General City Law, pursuant to which it is enacted.

§ 4. This local law shall take effect July first, nineteen hundred forty-eight.

APPENDIX C

Orders Appealed From

Order of Remittitur

COURT OF APPEALS

STATE OF NEW YORK

STATE OF NEW YORK, SS.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 2nd day of March in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

REMITTITUR March 2, 1961

No. 308

In the Matter of

the Application of TWENTIETH CENTURY-FOX FILM CORPORATION,

Appellant,

vs.

LAWRENCE E. GEROSA, as Comptroller of the City of New York,

Respondent,

for an Order &c.

Appendix C
Order of Remittitur

BE IT REMEMBERED, That on the 23rd day of September in the year of our Lord one thousand nine hundred and sixty, Twentieth Century-Fox Film Corporation, the appellant—in this cause, came here unto the Court of Appeals, by Royall, Koegel, Harris & Caskey, its attorneys, and filed in the said Court Notices of Appeal and return thereto from the orders of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Lawrence E. Gerosa, as Comptroller of the City of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals by Charles H. Tenney, his attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. William W. Owens, of counsel for the appellant—, and by Mr. Morris L. Heath, the counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the orders of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed, with costs. And thereafter a motion to amend the remittitur having been granted this remittitur is amended to the extent that the following is added: The reports in question were examined by the Court to determine whether they contained evidentiary matter and should have been included in the record. The Court concluded that such reports merely represented opinions of subordinates of the Comptroller and were irrevelant to a decision of the controversy. Otherwise, motion denied.

Appendix C
Order of Remittitur

AND thereafter a further motion to amend the remittitur having been granted this remittitur is further amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Appellant contended that the taxation of certain gross receipts of appellant in the calendar years 1946, 1947 and 1948 under Local Laws, 1946, No. 14 and 1948, No. 44 of City of New York was in violation of clause 2 of section 10 of Article I of the Constitution of the United States. The Court of Appeals held that there was no such violation.

AND it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said orders be affirmed, with costs &c., as aforesaid.

AND hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be

enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE.
—Albany, March 2, 1961.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON
Clerk.

Appendix C

Final Order On Remittitur

At a Special Term of the Supreme Court of the State of New York, Part II thereof, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on April 14th, 1961.

Present:

HON. WILLIAM C. HECHT, JR.,
Justice.

Index Number 9908-1958

In the Matter of the Application of

TWENTIETH CENTURY-FOX FILM CORPORATION,
Petitioner,

against

LAWRENCE E. GEROSA, as Comptroller of the City of New York,
Respondent,

for an order pursuant to Article 78 of the Civil Practice Act to review a determination of Lawrence E. Gerosa, as Comptroller of the City of New York.

Plaintiff having appealed to the Court of Appeals of the State of New York from the intermediate order of the Appellate Division of the Supreme Court of the State of New York in and for the First Department dated June 10, 1959 and entered in the office of the clerk of this court on June 18, 1959, and from the final order of the said Appellate Division

dated April 12, 1960 and entered in the office of the clerk of this court on April 26, 1960, and the Court of Appeals having decided the said appeals and there having been filed in the office of the clerk of this court on April 3, 1961 the remittitur dated March 2, 1961 from the said Court of Appeals wherein and whereby the said Court of Appeals affirmed with costs the orders of the appellate division so appealed from and granted in part and denied in part petitioner's motion to amend the remittitur, it is

ORDERED that the aforesaid orders of the Court of Appeals be, and the same hereby are, made the orders of this court.

ENTER,

/s/ W. C. H., Jr.
J. S. C.

Appendix C

Final Order On Remittitur

At a Special Term, Part II of the Supreme Court held in and for the County of New York at the County Courthouse in said County on the 23rd day of March, 1961.

PRESENT:

HON. THOMAS A. AURELIO,
Justice.

In the Matter of the Application of
TWENTIETH CENTURY-FOX FILM CORPORATION,
Petitioner-Appellant,

against

LAWRENCE E. GEROSA, as Comptroller of the City of New York,
Respondent,

for an order pursuant to Article 78 of the Civil Practice Act to review a determination of Lawrence E. Gerosa, as Comptroller of the City of New York.

The petitioner-appellant having appealed to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department as resettled by the order of said Court dated April 25, 1960, and entered in the Office of the Clerk of said Appellate Division on or about the 25th day of April, 1960, and from the intermediate order of the said Appellate Division entered in the Office of the Clerk of said Appellate Division on or about the 10th day of June, 1959, in so far as said order

approved and confirmed the determination of the respondent herein with respect to petitioner's liability for general business tax, and the appeal having been duly argued at the Court of Appeals and that Court in an order dated the 2nd day of March, 1961, having ordered and adjudged that the orders of the Appellate Division of the Supreme Court so appealed from be affirmed with costs and having further ordered that the records and proceedings in that Court be remitted to the Supreme Court there to be proceeded upon according to law.

Now upon reading and filing the remittitur from the Court of Appeals and on motion of CHARLES H. TENNEY, Corporation Counsel, attorney for respondent, it is

ORDERED that the order and judgment of the Court of Appeals be and the same hereby is made the order of this Court, and it is further

ORDERED that the respondent, Lawrence E. Gerosa, as Comptroller of the City of New York (Municipal Building, New York City) recover of the petitioner-appellant, Twentieth Century-Fox Film Corporation (444 West 56th Street, New York City) the sum of $278.93 costs as taxed and that said respondent have execution therefor, and it is further

ORDERED that the Clerk of the County of New York be and he hereby is directed to docket this order as a judgment.

ENTER

T. A. A.
J. S. C.

Appendix C

Order Denying Motion to Include Referees' Reports in the Record

COURT OF APPEALS

STATE OF NEW YORK

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Second day of March A. D. 1961.

HON. CHARLES S. DESMOND,

Chief Judge, presiding.

Mo. No. 76

In the Matter of the Application of
TWENTIETH CENTURY-FOX FILM CORPORATION,
Appellant,

vs.

LAWRENCE E. GEROSA, as Comptroller of the City of New York,
Respondent.

A motion having heretofore been made herein upon the part of the appellant for an order requiring the inclusion of two Referees' Reports in the record on appeal in the above cause and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix C
Order Denying Motion to Include Referees' Reports in the Record

ORDERED, that the said motion be and the same hereby is denied.

A copy

[SEAL OF COURT OF APPEALS
STATE OF NEW YORK]

GEARON KIMBALL
Deputy Clerk

Appendix C

Order On Motion to Amend Remittitur to Recite What Had Occurred On Oral Argument

IN COURT OF APPEALS

OF THE STATE OF NEW YORK

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-third day of March A. D. 1961.

PRESENT:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 198

In the Matter of the Application of
TWENTIETH CENTURY-FOX FILM CORPORATION,
Appellant,

vs.

LAWRENCE E. GEROSA, as Comptroller of the City of New York,
Respondent,

for an order &c.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of appellant herein and papers having been submitted thereon and due deliberation having been thereupon had:

ORDERED, that the said motion be and the same hereby is granted to the following extent: Return of the remittitur

Appendix C
Order On Motion to Amend Remittitur to Recite What Had Occurred On Oral Argument

requested and, when returned, it will be amended to state that:

> the reports in question were examined by the Court to determine whether they contained evidentiary matter and should have been included in the record. The Court concluded that such reports merely represented opinions of subordinates of the Comptroller and were irrelevant to a decision of the controversy.

AND the Supreme Court of the County of New York is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly; and it is

FURTHER ORDERED; That the said motion is otherwise denied.

RAYMOND J. CANNON
Clerk

A COPY

[SEAL OF COURT OF APPEALS
STATE OF NEW YORK]